IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

RACHEL AND P.J. ANDERSON,	)	
	)	
	)	
Petitioners/Appellee/Plaintiffs,	)	**COURT OF APPEALS OF**
	)	**TENNESSEE AT NASHVILLE**
v.	)	**Case No. M2017-00190-COA-R3-CV**
	)	
METROPOLITAN GOVERNMENT	)	
OF NASHVILLE &	)	
DAVIDSON COUNTY,	)	**CIRCUIT COURT FOR**
	)	**DAVIDSON COUNTY**
	)	**Case No. 15C3212**
Respondent/Appellant/Defendant.	)	

APPLICATION FOR PERMISSION TO APPEAL

BRADEN H. BOUCEK
B.P.R. No. 021399
Beacon Center of Tennessee
[redacted].
P.O. Box 198646
Nashville, TN 37219
[redacted]

Attorney for plaintiffs

TABLE OF CONTENTS

TABLE OF AUTHORITIES

U.S. Constitution

U.S. Supreme Court

U.S. Courts of Appeal

Tennessee Constitution

Tennessee Supreme Court

Tennessee Court of Appeals

Rules

Other cases

Law Reviews

Books

Other Authority

JURISDICTIONAL STATEMENT

The Andersons seek discretionary review of a judgment of the Tennessee Court of Appeals pursuant to Tenn. R. App. P. 11(a).

In an opinion filed on January 23, 2018, resolving an appeal as of right pursuant to Tenn. R. App. P. 3. Metro filed a petition for rehearing on February 2, 2018. The Court of Appeals denied the petition on February 6, 2018.

This Application is timely filed under Tenn. R. App. P. 11(b).

QUESTION PRESENTED FOR REVIEW

I. *What is the appropriate constitutional standard for reviewing Metro's monopoly on homesharing given that Tennessee's Constitution enumerates in the Declaration of Rights that monopolies are "contrary to the genius of a free State," and "shall not be allowed." See Tenn. Const. art. I, § 22.*

STANDARD OF REVIEW

Issues of constitutional interpretation are questions of law that are subject to *de novo* review without any presumption of correctness attached to the legal conclusions of the lower courts. *See Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827, 836 (Tenn. 2008).

RELEVANT FACTS

The facts are correctly stated in the opinion of the intermediate court and are not repeated. *See* Tenn. R. App. P. 11 (b)(3) (LexisNexis 2018).

INTRODUCTION AND REASON FOR GRANTING THE APPLICATION

Even though freedom from monopolies is an enumerated right under the Tennessee Constitution, the Court of Appeals regularly reviews government sponsored monopolies under the rational basis test. The use of the rational basis test for review of an enumerated right is an anomaly. As the U.S. Supreme Court said: "[o]bviously, the [rational basis] test could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right, be it the freedom of speech, the guarantee of double jeopardy, the right to counsel, or the right to keep and bear arms." *District of Columbia v. Heller*, 554 U.S. 570, 628 n.27 (2008) (citing *United States v. Carolene Products Co.*, 303 U.S. 144, 152 n.4 (1938)). This case presents an opportunity for the Court to articulate the standard of review for Tennessee's constitutional anti-monopolies provision, a question of vital importance to Tennessee constitutional law and thus particularly within the purview of this Court.

The rational basis test has, since statehood, rested upon the idea that courts should afford wide latitude to the legislature *unless it interferes with a constitutional right*. Freedom from monopolies is a constitutional mandate, at least in Tennessee. The Tennessee Constitution has never equivocated since the founding: monopolies "shall not be allowed" because they are "contrary to the genius of a free state[.]" Tenn. Const. art. I, § 22. Creating a monopoly is exactly what the Court of Appeals determined Metro did by enacting a 3% cap on non-resident homeowners per census tract who could practice homesharing. Yet the Court of Appeals found this monopoly justified as a legitimate use of the police powers. This light regard for a right protected by Tennessee's Constitution is not founded on anything from this Court or the U.S. Supreme Court. Indeed, the very opposite is true if ideas are taken to their logical conclusion. Deference towards the legislature is due when the Constitution is silent, not when it so directly prohibits a particular governmental action like the Tennessee Constitution does with monopolies.

Appropriately then, this Court has never employed the rational basis test when reviewing a monopoly. In fact, this Court has never truly defined the appropriate test – at least not one that that accords with modern practice – or clearly stated how compelling the government's interest must be to enact monopolies. This Court last addressed the anti-monopolies clause before the advent of constitutional tests involving "tiered" rights. In the absence of clear instruction from this Court, the Court of Appeals resorted to the rational basis test largely out of a misplaced reliance on federal case law dealing with monopolies – one necessarily disparate from Tennessee. Unlike the U.S. Constitution, the Tennessee Constitution enumerates the right to be rid of monopolies in Declaration of Rights. The time is ripe for this Court to decide if - and how - that makes the question different under Tennessee law.

Although this case involves the sharing economy and a first-of-its-kind ordinance in Tennessee, it is, nevertheless, about nothing new. Both homesharing and monopolies are common fixtures throughout history and can even be fairly described as ancient.

Homesharing

Homesharing – renting out one's home on a short term basis – has been part of home ownership and neighborhoods for a long time. *See* Christina Sandefur, *Turning Homeowners into Outlaws: How Anti-Home-Sharing Regulations Chip Away at the Foundation of an American Dream*, 39. U. Haw. L. Rev. 395, 396 (2017) (explaining that homesharing is "a centuries-old American tradition"). One might even say the practice has existed since at least biblical times. Joseph and Mary were not, contrary to popular myth, denied a room at an inn, but rather at a home. Stephen C. Carlson, *The Accommodations of Joseph and Mary in Bethlehem*, New Test. Stud. 56, 326-342 (July 2010). Most of the delegates to the Constitutional Convention were taken into private residences during their time in Philadelphia. Ellis Paxson Oberholtzer, *The Literary History of Philadelphia* 105

(1906). At multiple points in his career Lincoln was a transient occupant, such as when he was elected to Congress and moved to Washington. Chris Derose, *Congressman Lincoln* 9-10 (2013); David Herbert Donald, *Lincoln* 119-120 (1995). John Wilkes Booth and his conspirators planned Lincoln's assassination at the boarding home of Mary Surratt, where they frequently stayed. Guy W. Moore, *The Case of Mrs. Surratt* 10, 13 (1954); David O. Stewart, *The Family Plot to Kill Lincoln*, The Smithsonian (Aug. 28, 2013).

The practice of homesharing features prominently in Tennessee history. When the Presleys moved from Tupelo to Memphis in 1948, young Elvis and his family took up temporary residence in multiple homes before finally settling on an apartment. Peter Guralnick, *Last Train to Memphis* 32 (1994). Andrew Jackson met his wife, Rachel, while staying at Rachel's mother's house, where John Overton, co-founder of the City of Memphis, was also a guest. *See* Frances Clifton, *John Overton as Andrew Jackson's Friend* 11 Tenn. Hist. Q. 23, 23, 33 (1952). Meriwether Lewis of the famed Corps of Discovery died at a lodging house off the Natchez Trace under a shroud of mystery that endures to this day. Jonathan Daniels, *The Devil's Backbone: The Story of Natchez Trace* 173 (1962); Abigail Tucker, *Meriweather Lewis's Mysterious Death*, The Smithsonian (Oct. 8, 2009).[1]

Homesharing in America has been especially important to historically marginalized communities. The practice was so common during the nineteenth century that one in three to one in five households housed transients. Jamilia Jefferson-Jones, *Airbnb and the Housing Segment of the Modern "Sharing Economy": Are Short-Term Rental Restrictions an Unconstitutional Taking?,* 42 Hastings Const. L.Q. 557, 563 (2015). In the mid-1800s, three-fourths of the adults in Manhattan boarded in someone else's home. *Id.* at 562. The practice "was widespread and crossed class boundaries." *Id.* at 563. These sorts of places "were

[1] Also available at: http://www.smithsonianmag.com/history/meriwether-lewis-mysterious-death-144006713/?no-

remarkably diverse establishments" that housed "residents of particular class, gender, racial, occupational, political, moral, or religious identities." *Id*. at 563-64. Often the proprietors were those otherwise excluded from entrepreneurship, "including women, minorities and immigrants." *Id*. at 564. Staying in the homes of others while travelling proved to be a necessary solution for African-American travelers during the Jim Crow era. "During the days of segregation, traveling businessmen or musicians would often spend nights in the homes of local residents because they were excluded from hotels." Sandefur, *supra*, at 396. The "Green-Book" was a "crowd-sourced guide to navigate segregation" that listed private residences available for use that "prefigured today's residential lodging networks; like Airbnb . . . . ." Jacinda Townsend, *Driving While Black: African Americans used a crowd-sourced guide to navigate segregation*, The Smithsonian 52-53 (Apr. 2016).[2] Despite what segregationists might have feared about the effect on residential character, "it was an honor to have one's home listed as a rooming house in the Green-Book." *Id*. The Green Book showed the importance of private means and individual entrepreneurship even in the face of government sanctioned Jim Crow laws.

Contemporary culture still recognizes the way in which homesharing provided opportunities to rise out of poverty. Jidenna, whose "mamma . . . taught [him] how to make a silver spoon out of plastic," alluded to the economic freedom he earned through homesharing when he outlined that he "AirBnB the crib like a hostel." Jidenna, *Long Live the Chief* (Wondaland and Epic Records 2015). Homesharing is an idea whose time has come back around.

[2] Also available at: *How the Green Book Helped African-American Tourists Navigate a Segregated Nation.* http://www.smithsonianmag.com/smithsonian-institution/history-green-book-african-american-travelers-180958506/ (last viewed Apr. 1 2018)

Monopolies

Monopolies are all too common throughout history as well. During the founding generation, monopolies were every bit the royalist affront as bills of attainder or restrictions on free speech. *See generally* Steven G. Calabresi & Larissa C. Leibowitz, *Monopolies and the Constitution: A History of Crony Capitalism*, 36 Harv. J.L. & Pub. Pol'y 983, 985 (2013). This historical experience with monopolies highlights the importance of attaching a modern constitutional framework to the anti-monopolies clause.

The concept of a monopoly was well understood at the time of the founding. *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 51 (1911). In modern parlance, "monopoly" carries different connotations; however, "constitutional principles must capture the intentions of the persons who ratified the constitution." *Martin v. Beer Bd. for Dickson*, 908 S.W.2d 941, 947 (Tenn. Ct. App. 1995); *see also Barrett v. Tenn. Occupational Safety & Health Review Comm'n*, 284 S.W.3d 784, 787 (Tenn. 2009) ("The fundamental purpose in construing a constitutional provision is to ascertain and give effect to the intent and purpose of those who adopted it.") (citation omitted). Though the modern mind may perceive "the word 'monopoly' [as] generally [] used to refer to the private accumulation of economic power, this is not the meaning that was originally attached to the term." Calabresi & Leibowitz, *supra*, at 984. Originally, a monopoly "was an exclusive grant of power from the government – in the form of a 'license' or 'patent' – to work in a particular trade or sell a specific good." *Id*.

The founders despised monopolies, long a privilege the king doled out to a select few that came at the expense of the natural rights of the people to provide for themselves. *See id*. ("[M]onopolies . . . plagued England in the late sixteenth and early seventeenth centuries, leading to both *The Case of the Monopolies* and the parliamentary Statute of Monopolies."). Prior to the Revolution, monopolies were understood to violate the natural

rights of the people, as expressed in the Magna Carta. Timothy Sandefur, *Equality of Opportunity in the Regulatory Age: Why Yesterday's Rationality Review Isn't Enough*, 24 N. Ill. U. L. Rev. 457, 461 (2004) (quoting Coke: "Generally all monopolies are against this great charter, because they are against the liberty and freedome of the subject, and against the law of the land."). The founders frequently cited them as one of the chief nuisances to a free people. For instance, Madison wrote: "That is not a just government, nor is property secure under it, where arbitrary restrictions, exemptions and monopolies deny to part of its citizens the free use of their faculties." Calabresi & Leibowitz, *supra*, at 1016 (citation omitted). Thomas Jefferson and George Mason actually argued with Madison for an anti-monopolies clause to be in the U.S. Constitution, as was later done in Tennessee. *Id.* at 1009. Madison opposed Jefferson and Mason, not because he detested monopolies any less and did not view them as "justly classed among the greatest nuisances in Government," but because he thought monopolies were unlikely to plague a representational government where any abuses would likely favor the many over the few, not the other way around. *Id.* at 1011, 1015-16. When complaining about the deficiencies in the proposed constitution, Jefferson argued for a bill of rights prohibiting monopolies, much as it needed protection of speech. *Id.* at 1010. Six of the original states pushed for an anti-monopolies provision in the U.S. Constitution. *Id.* at 1013. Interestingly, the only state that pushed for a federal anti-monopoly clause, later adding it in its state constitution, was North Carolina. *Id.* at 1014-15, 1073.

Because it has no federal equivalent, the anti-monopolies clause derives from "other state constitutions." *See Martin*, 908 S.W.2d at 948. And because the Tennessee Constitution was largely based on North Carolina's, *see* Lewis L. Laska, *The Tennessee State Constitution A Reference Guide* 2 (1990), which has an identical anti-monopolies

clause, *see* N.C. Const. art. I, § 34, it is safe to conclude this was the source for Tennessee's. Regardless, the stated right to be free from monopolies, "generally reflect[s] the prevailing political philosophy of the time," *Martin*, 908 S.W.2d at 948, and thus its relatively lesser known origins ought to be appreciated.

Tennessee's constitutional prohibition on monopolies, Tenn. Const. art. I, § 22, is thus gracefully nestled in between a prohibition on the taking of property without just compensation, Tenn. Const. art. I, § 21, and protection for the right of assembly. Tenn. Const. art. I, § 23. All three comprise, as does the entire Declaration of Rights, parts of a coherent, whole, philosophy that reflects "a classically American theory of the relationship between the government and its citizens, very much in accord with the thinking of our nation's founders." Glenn Harlan Reynolds, *"The Law of the Land": Tennessee Constitutional Law: The Right to Keep and Bear Arms Under the Tennessee Constitution: A Case Study in Civic Republican Thought*, 61 Tenn. L. Rev. 647, 652 (1994).

The Court should review this case to articulate the appropriate constitutional test for reviewing the anti-monopolies clause of the Tennessee Constitution. In the absence of a modern decision from this Court, the lower courts have resorted to the highly deferential rational basis test. This Court last substantively addressed the prohibition on monopolies in *Checker Cab Co. v. Johnson City*, 216 S.W.2d 335 (Tenn. 1948). That case did not employ the rational basis test as currently understood because, as shown below, the whole notion of "tests" for rights had yet to be flushed out. The rational basis test might make sense in federal court, but not in Tennessee, where the prohibition on monopolies is an enumerated right couched in unusually firm language.

ARGUMENT

This Court generally considers the following reasons when granting review: (1) the need to secure uniformity of decisions, (2) the need to secure settlement of important

questions of law, (3) the need to secure settlement of questions of public interest, and (4) the need for the exercise of the Supreme Court's supervisory authority. Tenn. R. App. P. 11(a) (LexisNexis 2018).

- This Court should *settle important questions of law* by providing a constitutional standard for an enumerated right that it has not addressed substantively since 1948, including how important the government's interest must be before it may enact monopolies. Since this Court last truly engaged with the anti-monopolies clause, constitutional law has shifted strongly in favor of more vigorously scrutinizing laws that burden enumerated rights. In the absence of recent guidance from this Court, the Court of Appeals grasped for one they recognize and reached the rational basis test used by federal courts. Presumably this is because monopolies implicate economic liberty and economic liberty receives scant federal protection. But comparisons to federal analysis are specious. Monopolies do not implicate an enumerated right under the federal constitution whereas they do in Tennessee. Enumerated rights – both in federal and state courts – ordinarily entail heightened scrutiny. By resorting to rational basis review, the lower courts aberrantly turned a right that *is* enumerated in Tennessee into a redundant protection against arbitrary laws, as if it had not been specified at all. The resolution of these questions affects the analysis with respect to a Tennessee constitutional right, making the question of high importance for the court of last resort for the Tennessee Constitution.

This Court should *secure uniformity in decisions* by deciding whether the courts should examine whether a monopoly was enacted to protect private economic interests and not the public. This Court has long instructed that monopolies are impermissible when intended as economic favoritism. The Court of Appeals inconsistently applies the test, recognizing that monopolies intended for private benefit are impermissible, but then announcing itself powerless to scrutinize legislative purpose, as happened in this case. The

Court of Appeals correctly identified Metro's 3% cap as a monopoly, recognized that monopolies intended to enrich private parties were impermissible, and yet inexplicably refused to consider evidence that Metro's monopolies were intended to protect the entrenched hospitality sector from an emergent threat. Review by this Court can provide consistency to the jurisprudence.

Review of this case would also *settle a question of public interest.* The homesharing debate has roiled Nashville like no other. Increasingly, outmoded industries resort to the force of law to shut down emergent threats. Much the same way cab companies tried to curtail ridesharing services, traditional hospitality quarters eye measures designed to level the playing field with homesharers. As the new economy disrupts older industries, the public has a broader interest in knowing to what lengths governments may go in response.

I. This Court can settle an important question of Tennessee constitutional law: what is the proper analysis for review under the anti-monopolies clause, an enumerated – and thus, *fundamental* -- right in Tennessee that has not been examined since 1948.

The crucial question of law presented by this case - what level of constitutional review applies when evaluating the constitutionality of a government-sponsored monopoly - is ripe for this Court to review. Since this Court last substantively considered an anti-monopolies claim, the law strongly shifted to favor a more vigorous scrutiny of laws that burden enumerated rights like the prohibition on monopolies in Tennessee. The lower courts, in the absence of modern guidance from this Court, mimic the federal courts by using rational basis review. But the right to be free from monopolies is not an enumerated right under federal law. Review of an enumerated right under rational basis is anomalous because enumerated rights are fundamental, and every other fundamental right has always warranted heightened judicial scrutiny from this Court. As this Court has not substantively

discussed the applicable standard since this profound shift in the law, the time is right to explicate the level of review to be applied to this fundamental right.

This case is also ripe for this Court to address how important the government's interest must be before it may override the constitutional prohibition of monopolies. True to rational basis, the lower court said the interest need only be legitimate. For instance, in this case the Court of Appeals ruled that monopolies were acceptable so long as Metro acted within its police powers. This treats monopolies no differently than any ordinary regulation. The same standard should not be used for monopolies, which were, unlike the U.S. Constitution, singled out for special constitutional significance. Besides, any law must be within the city's police powers in the first place or it is constitutionally arbitrary. To review a government sponsored monopoly in this manner turns a fundamental right into a redundant nullity, and treats it no differnently than if it had never been spelled out at all, just as under federal law.

The resolution of these questions is critically important because the answers pertain to an important and distinctive right that has largely been overlooked and devitalized.

A. The proper constitutional standard to use for this fundamental right is an important question of law that is ripe for this Court to settle.

This Court last substantively considered an anti-monopolies claim in 1948 with the case of *Checker Cab Co. v. Johnson City*, 216 S.W.2d 335 (Tenn. 1948). Much has changed since. That case predated the very foundations of modern constitutional law characterized by applying different levels of review to different rights depending on whether the rights are fundamental. The deferential standard used by the Court of Appeals here – while customary in reviewing unenumerated economic rights in federal courts – is misplaced when applied to an enumerated constitutional right because enumerated rights are

otherwise considered fundamental, thus warranting heightened scrutiny. Review of this case would provide a much needed update.

1. *This Court has not issued a major anti-monopolies ruling since 1948.*

The last time this Court addressed the anti-monopolies clause with any substance was in *Checker Cab*. The operation of taxi cabs in Johnson City "materially concern[ed] the safety and welfare of all its people," so this Court determined that they may be regulated. 216 S.W.2d at 336-37. But the decision of the city to deny some people the ability to participate in an economic opportunity that others enjoyed constituted a monopoly. Monopolies were justifiable, but only "in so far as such monopoly has a reasonable tendency to aid in the promotion of the health, safety, morals and well being of the people." *Id*. at 337 (citations omitted). It was not enough merely to connect the monopoly over "with the exercise of a police power" because the power to license or regulate "does not carry the implied authority to create a monopoly therein." *Id*. (quotation omitted). This Court "sought in vain to discover some legitimate relation between the public purpose" and the monopoly. *Id*. Finding none, this Court struck down the monopoly: "it is one thing to regulate and tax a public carrier, and yet another thing to grant it a monopoly in the teeth of the constitutional inhibition." *Id*. at 338 (quoting *N. Little Rock Transp. Co. v. N. Little Rock*, 184 S.W.2d 52, 55 (Ark. 1944)). The holding certainly set precedents capable of following, but it does not easily chart on today's constitutional landscape.

The *Checker Cab* opinion lacked many of the hallmarks of modern constitutional law. This Court did not identify whether the right in question was fundamental. This Court did not identify the appropriate test for review: strict scrutiny, intermediate, or rationale basis. This Court did not articulate the requisite level of governmental interest. Finally, this Court did not provide any tailoring guidance about how well the monopoly must fit the purported governmental interest. As a result of reasons which are discussed more fully

below, the contemporary framework under which constitutional claims are evaluated is not easily applied to an older case like *Checker Cab*. Any current claim under the anti-monopolies clause is thus guided by a holding that is not readily applicable and which, as shown below, results in the Courts of Appeals using a deferential form of review even though the very foundation for rational basis rests on deference towards the legislature when it comes to to *un*enumerated rights.

This Court has only dealt in passing with the anti-monopolies clause twice since *Checker Cab*. The first, *Landman v. Kizer*, 255 S.W.2d 6, 7 (Tenn. 1953), held in conclusory fashion that a limit on the number of liquor licenses was constitutional because it protected the public. It did not spend any time discussing the appropriate standard and of course liquor licenses demonstrably affect the moral and physical well being of the public in ways unlike many other businesses. The second case, *Nashville Mobilephone Co. v. Atkins*, 536 S.W.2d 335, 340 (Tenn. 1976), involved a public utility. This Court said the anti-monopoly issue was waived before holding – again, with no real discussion over the constitutional standard – that Tennessee's Radio Common Carrier Act was constitutional. *Id.* Neither case explained the proper test for this enumerated right under the modern practice of reviewing rights with different levels of scrutiny based on their relative importance, or why. The *Checker Cab* decision then marked the last time this Court dealt with the anti-monopolies clause with any rigor.

2. *Constitutional methodology has undergone profound change since 1948, especially with regard to fundamental rights.*

Constitutional review – especially of laws that impact economic liberties – has changed dramatically throughout the last century. The three tests (strict scrutiny, intermediate, rational basis) are not required by any constitution. *See* Richard H. Fallon, Jr. 54 UCLA L. Rev. 1267, 1268 (2007) ("The words 'strict judicial scrutiny' appear nowhere

in the U.S. Constitution."). Rather, they are a judicial creation. *Montgomery v. Carr*, 101 F.3d 1117, 1122 (6th Cir. 1996) ("The Supreme Court's authority to delineate these different tiers of judicial review is not apparent."). Still more, tiers of scrutiny are a relatively new concept. *Whole Woman's Health v. Hellderstedt*, 136 S. Ct. 2292, 2327 (2016) (Thomas, J., dissenting) (describing the origins of the tests – "Though the teirs of scrutiny have become a ubiquitious feature of constitutional law, they are of recent vintage."). This Court can hardly be faulted for not using one of the tests in *Checker Cab* because, in 1948, they had yet to be invented. In other words, the current methodology of review is a relatively recent innovation from the Supreme Court.

To backtrack a bit, in the early part of the 20th century, the Supreme Court displayed a willingness to strike down economic regulation under a theory of substantive due process, best known from the decision in *Lochner v. New York*, 198 U.S. 45 (1905). *See* Fallon, 55 UCLA L. Rev. at 1285. The methodology employed in the *Lochner* ruling did not utilize "standards of review in the modern sense." *Id*. In keeping with the prevailing legal thought at the time, "the Court conceived its task as marking the conceptual boundaries that defined spheres of state and congressional power on the one hand and of private rights on the other." *Id*. The Supreme Court's decision in *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937), however, signaled the end of meaningful federal review of economic measures. *See* Anthony B. Sanders, *The "New Judicial Federalism" Before its Time: A Comprehensive Review of Economic Substantive Due Process Under State Constitutional Law Since 1940 and the Reasons for its Recent Decline*, 55 Am. U. L. Rev. 457, 473 (2005). Largely as an "overreacti[on] to its traumatic collision with the New Deal" following the collapse of *Lochner,* and for a period that notably included the *Checker Cab* decision, "the Court would fain uphold the actions of the other branches of government, granting them a presumption of constitutionality that could be overcome only by showing them to be clearly irrational or

unreasonable," regardless of what rights were impacted. *See* Jeffrey M. Shaman, *Cracks in the Structure: The Coming Breakdown of the Levels of Scrutiny*, 45 Ohio St. L.J. 161, 161 (1984). But this period of extreme deference across the board was not to last either.

It was the 1960s when the Supreme Court began to take seriously its role in enforcing constitutional rights by turning to the strict scrutiny test. Even when the Court retreated into a stance of extreme deference, it nevertheless left open the question of whether "all claims of constitutional right henceforth trigger no more than an all but meaningless rational basis inquiry[.]" Fallon, *supra*, at 1288. If this was so, then any right – be it free speech, voting, or free exercise of religion – was left unburdened only by legislative grace. By the 1960s, the Court realized this was untenable. At least when it came to certain rights deemed more necessary of judicial protection, the Court began strictly scrutinizing legislation as opposed to glancing at them for mere rationality.[3] *See id*. at 1275 ("Before the 1960s, there was no strict scrutiny as we know it today. By the end of the decade, it dominated numerous fields of constitutional law."). "There were precursors, but the precursors took varied linguistic forms as the Court worked out the demands that strict scrutiny today expresses." *Id*. at 1284. The well known "footnote four" in *United States. v. Carolene Products Co.*, comprised the first strand of thought for treating different rights to more rigorous treatment. *See United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). From this seed grew the doctrine of tiered rights with different levels of review.

Importantly, the tiered approach was always rooted in the idea that enumerated rights are different. The Court thought it highly significant that the ban in *Carolene Products* did not involve an enumerated right. *Id*. at 152-53. Had it been so, the Supreme

[3] The intermediate scrutiny test "was the most recent tier of constitutional review to develop," and began in the 1970s as a way to fashion constitutional protections for laws that treated women differently. *Montgomery*, 101 F.3d at 1121.

Court would have engaged more rigorously. *Id*. at 152-53 n.4. (the Court's scrutiny should be "narrower . . . when legislation appears on its face to be within a specific prohibition of the Constitution"). An effort to burden an enumerated right "may call for a correspondingly more searching judicial inquiry." *Id*.[4] Though it took a while for this footnote to fully mature, it ultimately fruited the strict scrutiny test. Fallon, 54 UCLA L. Rev. at 1289-291. Economic liberty was to receive the most deferential form of review because it was not, on its face, within a specific prohibition of the Constitution. That makes coherent sense *in federal courts* under the established rubric because, harkening back to footnote four, economic rights are not enumerated and so the legislature must be given maximum room to work. *See Carolene Products*, 304 U.S. at 152 n.4 (laws burdening enumerated rights "may call for a correspondingly more searching judicial inquiry"). In contrast, the implications of a right being enumerated have changed dramatically since 1948.

The U.S. Supreme Court squarely disavowed the use of the rational basis test for review of laws which burden an enumerated right because such rights are, as shown below, regarded as fundamental. "Obviously, the same test could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right." *Heller*, 554 U.S. at 629. The presumption of validity that courts normally show to the legislative branch is for a "classification neither involving fundamental rights nor proceeding along suspect lines." *Heller v. Doe*, 509 U.S. 312, 319 (1993) (citations omitted). This Court has never given any reason to treat this or any other enumerated right any differently under Tennessee law. Whether that matters when it comes to monopolies is the question that lies at the heart of this case, and why it is appropriate for this Court to grant review.

[4] Along with enumerated rights, rights crucial to the voting process, or affecting "discrete and insular minorities might also trigger "exacting judicial scrutiny." 304 U.S. at 152 n.4.

3. *The Court of Appeals uses rational basis, or something like it, when reviewing burdens on this fundamental right.*

In the absence of a decision from this Court articulating a modern standard, the lower courts have looked to federal courts when reviewing monopolies, without factoring in the constitutional differences. The Court of Appeals on two occasions flatly declared rational basis as the proper test for reviewing a monopoly. *See Dial-A-Page v. Bissell*, 823 S.W.2d 202, 206-07 (Tenn. Ct. App. 1991); *Esquinance v. Polk Cty. Educ. Ass'n*, 195 S.W.3d 35, 47 (Tenn. Ct. App. 2005). In the case presently before the Court, the Court of Appeals observed that it "has likened the standard to rational basis review." Slip. Op. at 12 n. 8. But the adoption of the rational basis test – or anything like it – was not, despite some insinuation from the lower courts to the contrary, something that emerged from this Court, as well as also being discordant with how courts otherwise protect enumerated rights.

Rather, when the rational basis test first came through the anti-monopolies door, it was almost as if by accident. In *Dial-A-Page*, the Court of Appeals first announced that the rational basis test was the test under the anti-monopolies clause. 823 S.W.2d at 206. Remarkable for a ruling first assigning a constitutional standard, the Court of Appeals cited no authority whatsoever for that particular proposition. *Id*. In explaining *how* to apply the rational basis test, the Court of Appeals then cited this Court's decision in *Chapdelaine v. Tennessee State Bd. of Examiners*, 541 S.W.2d 786 (Tenn. 1976), for authority.[5] But *Chapdelaine* was not a case brought under the anti-monopolies clause. Instead, it reviewed a challenge to a license for land surveyors as exceeding the state's police powers. *Id*. at 786-87. Monopolies never came up. A closer look at *Chapdelaine* reveals that it was a substantive due process case. The claim relied upon *Livesay v. Tennessee Bd. of Examiners in Watchmaking*, 322 S.W.2d 209 (Tenn. 1959), a *substantive due process* case brought

[5] For its part, *Esquinance* merely relied on *Dial-A-Page* in concluding that the rational basis test was appropriate. 195 S.W.3d at 47. Rational basis review of monopolies originated with *Dial-A-Page*.

under Tenn. Const. art. I, § 8, and the Fourteenth Amendment. *Id*. at 211. That makes all the difference. Unrelated to the anti-monopolies clause, this Court has held that review to the unenumerated right to substantive due process under Tenn. Const. art. I, § 8, should utilize the rational basis test. *See Newton v. Cox*, 878 S.W.2d 105, 110 (Tenn. 1994). Despite any insinuation to the contrary, nothing in the *Chapdelaine* case suggests that the same test should be used to review a monopoly. In short, the Court of Appeals appears to have guessed when it began using the rational basis test for anti-monopolies claims, but the rational basis test is what it uses. The appropriate test to use and why involve open and important questions of law.

4. *Rational basis review of a fundamental right would be anomalous.*

The logic applied to an unenumerated right – both by federal and state court - ought not to be reflexively extended to Tennessee law, where freedom from monopolies *is* an enumerated right. *See* Tenn. Const. art. I, § 22. Tennessee's constitutional law analysis otherwise proceeds along the same track. Tennessee generally recognizes the same three tiers of scrutiny. *Brown v. Campbell Cty. Bd. of Educ.*, 915 S.W.2d 407, 413 (Tenn. 1995) ("[I]n analyzing equal protection challenges, we have followed the analytical framework developed in the United States Supreme Court, which, depending on the nature of the right asserted, applies one of three standards on scrutiny . . . ."). Tennessee courts, like federal courts, review legislation that impacts a fundamental right under strict scrutiny. *See e.g., State v. Tester*, 879 S.W.2d 823, 828 (Tenn. 1994) ("Equal protection analysis requires strict scrutiny of a legislative classification only when the classification interferes with the exercise of a 'fundamental right' . . . ."); *see also Planned Parenthood of Middle Tenn. v. Sundquist*, 38 S.W.3d 1, 11 (Tenn. 2000) ("Tennessee courts have adopted this 'strict scrutiny' approach in regards to fundamental rights without exception.") (citation omitted). And just like federal courts, when a fundamental right is not involved, Tennessee courts

use the rational basis test to "review the statute or ordinance to determine whether it bears a reasonable relation to a proper legislative purpose and whether it is neither arbitrary or discriminatory." *Martin*, 908 S.W.2d at 955. The threshold inquiry, then, is whether the right is fundamental or not. *See Tester*, 879 S.W.2d at 828; *Sundquist*, 38 S.W.3d at 11 ("[F]undamental rights receive special protection under both federal and state constitutions."). And again, like the U.S. Supreme Court, this Court has held that rights are fundamental when they are "*either implicitly or explicitly protected by the Constitution*."[6] *Tester*, 879 S.W.2d at 828 (emphasis added). Both Tennessee and the United States agree that rights expressly laid out in the Constitution get vigorous protection. Where the two diverge is on the matter of what rights their respective constitutions explicitly protect.

Freedom from monopolies is explicitly protected by Tennessee's Constitution. Tenn. Const. art. I, § 22. So, as a matter of Tennessee constitutional law, the logical conclusion from well recognized principles is that right to be free from monopolies is a fundamental right. Rational basis review would be just as inappropriate for this enumerated right as it would be for a burden on speech. The anti-monopolies clause ought to receive vigorous scrutiny. Federal law cannot simply be applied to Tennessee constitutional review. To try and make it work marks an effort to cram a misfitting peg into the wrong hole.

At least historically speaking, this Court cultivated the differences between Tennessee and federal jurisprudence. Both this Court and the U.S. Supreme Court have issued major cases regarding the constitutionality of monopolies of slaughterhouses that are mirror images of one another. Even before *Lochner*, the Supreme Court disavowed any constitutional prohibition on a monopoly over slaughterhouses because they were not proscribed by the U.S. Constitution. *See The Slaughter-House Cases*, 83 U.S. 36 (1872). But

[6] Rights are also fundamental when deeply rooted in the Nation's history and traditions and when it is inherent in the tradition of ordered liberty. *See Sundquist*, 38 S.W.3d at 11-12.

this Court reached the opposite result as a matter of Tennessee law because monopolies are explicitly forbidden in Tennessee. Exercising its special responsibility to the Tennessee Constitution, this Court took the opposite track by striking down a monopoly in *Noe v. Mayor of Morristown*, 161 S.W. 485, 487 (Tenn. 1913), over slaughterhouses, thus providing the perfect parallel. This Court was keen to maintain the constitutional distinctions and did so. But it must again be stressed that this opinion predated even *Checker Cab* and thus it too lacked a modern test to guide lower courts. Nevertheless, both courts illustrated the historic differences between the state and federal constitutions by how each reviewed monopolies of slaughterhouses.

In conclusion, this Court should settle an important question of law: what is the correct test to use when reviewing claims under the anti-monopolies clause? The lower courts appear to have drifted into uncritical acceptance of the rational basis test largely from the momentum set by federal courts. This has created a constitutional aberrancy – the use of the rational basis test on an enumerated, fundamental right. It is important for this Court to settle how anti-monopolies claims fit with the current taxonomy of rights, conceived since this Court last visited the anti-monopolies claim with any rigor.

B. This Court can address another important question of law: how compelling the government's interest must be before it can override Tennessee's constitutional prohibition on monopolies?

The second important question of law that this case presents is closely related to the first: how compelling must the government's interest be before enacting monopolies? True to rational basis review, the lower courts reason that monopolies are acceptable so long as they further a legitimate governmental interest. The question of legitimacy is synonymous with whether the government was acting within its police powers. *See Cosmopolitan Life Ins. Co. v. Northington*, 300 S.W.2d 911, 918 (Tenn. 1957) (stating that classification enacted under the police powers need only have some rational basis). The Court of Appeals

consistently ruled in this case in finding that any monopoly "directed toward the public good," or promoting "welfare" under the police power was justifiable. Slip. Op. at 9-10, n.5. No other enumerated right is so lightly brushed aside presenting another anomaly. Besides, any law must be within the city's police powers or it would be constitutionally arbitrary in the first place, meaning this right provides no freestanding protection even though it is a constitutionally freestanding provision. By outlining the appropriate test, this Court can settle the important question of law on what governmental interests – if any – can justify a monopoly in light of the direct constitutional prohibition.

1. *Fundamental rights require correspondingly greater justifications.*

Under the tiers-of-review approach, the government's justifications must be correspondingly greater for fundamental rights.[7] "Fundamental" rights, such as the right to freedom of speech and the right to travel between states, *see Newton*, 878 S.W.2d at 109, may not be restricted except when there is a compelling governmental interest that cannot be achieved through less restrictive means. *See State v. Smoky Mountain Secrets*, 937 S.W.2d 905, 910 (Tenn. 1996). In contrast, under rational basis, the government's interest need only be "legitimate." *See Doe v. Norris*, 751 S.W.2d 834, 839 (Tenn. 1988). The legislature has the legitimate power to regulate economic activity that is "related to the health, safety, morals or welfare of the public generally." *State v. Spann*, 623 S.W.2d 272, 273 (Tenn. 1983).

[7] Ultimately though, the decision to assign a particular test is a judicial assignment. "A large part of the explanation for the three tiers of constitutional judicial review is history and, candidly, a normative preference by the Supreme Court for strong protection for some types of constitutional rights over others." *See Montgomery*, 101 F.3d at 1123. For this reason, it is crucial that the process of assigning a test be rooted in something neutral and principled. Any approach that subjects different enumerated rights to different levels of review would run the risk of making this judicial assignment arbitrary.

2. *The Court of Appeals only requires that an interest be legitimate before governments can enforce monopolies.*

In using the rational basis test when reviewing monopolies, the Court of Appeals has only required an interest that is legitimate – or that "the activity is related to the health, safety, morals or welfare of the public." *Dial-A-Page,* 823 S.W.2d at 206. The Court of Appeals has compared the power to regulate under the police powers with the power to monopolize, attaching no significance to the fact that the Tennessee Constitution singles one out for prohibition. *Id*. (discussing the anti-monopolies test: "Similarly, it has been held that the legislature may *regulate* activity which would otherwise be privately operated if the activity is related to the health, safety, morals, or welfare of the public.") (emphasis added) (citation omitted). The decision in this case was equally permissive, viewing monopolies "directed to the public good," slip. op. at 9, or promoting public "welfare" as sufficiently compelling to override Tennessee's categorical prohibition of them by Constitution. Slip. Op. at 10, n.5. As the Court of Appeals wrote: "Our Constitution simply does not prohibit monopolies that bear a legitimate relation to such purposes and the well-being." Slip. Op. at 12. As pertained to the stated interest here – protection of residential character – the Court of Appeals sanctioned the legitimacy of this interest even while conceding that the interest might merely promote "an aesthetic consideration." Slip. Op. at 13. The interest required before the government may impose monopolies – which, again, the Constitution says "shall not be allowed," Tenn. Const. art. I, § 22 – has become thin and shrinking, now tolerating even monopolies that exist to please the eye of a political majority.

3. *If governments need only be legitimately acting within their police powers, then the anti-monopolies clause is a redundant nullity.*

An application of the rational basis test or anything like it a governmental monopoly was almost certainly wrong as a matter of Tennessee constitutional law. Review under the

rational basis test for an interest that need only be legitimate produces another constitutional anomaly: an enumerated right that provides merely redundant protection.

Rational basis review and limitations on the police powers already prohibit irrational laws that do not promote the public's welfare. "[R]ational-basis scrutiny is a mode of analysis we have used when evaluating laws under constitutional commands that are themselves prohibitions on irrational laws." *Heller*, 554 U.S. at 628 n.27. Laws aimed at illegitimate ends are invalid *per se* because they are constitutionally irrational. "[W]here the Legislature seeks to regulate a business or profession that has no connection with public health, morals, comfort, or welfare of the people, it is not subject to the application of the State's police power." *Bd. of Dispensing Opticians v. Eyear Corp.*, 400 S.W.2d 734, 742 (Tenn. 1996); *see also Spencer-Sturla Co. v. Memphis*, 290 S.W. 608, 611 (Tenn. 1926) (stating that a law is invalid if "the powers conferred upon the municipalities by the statute do not fall within the police power"). It would be invalid even under the federal Constitution, where monopolies are nowhere mentioned. *See Lawton v. Steele*, 152 U.S. 133, 137 (1894) (explaining that improper exercise of the police powers is unconstitutional as a matter of federal law).

If legitimate use of the police powers sufficed to work around this constitutional limitation, *see* slip. op. at 10, then the anti-monopolies clause would only prohibit irrational laws that were already illegitimate. The Declaration of Rights, like the Bill of Rights, was intended to layer an additional limitation on top of the idea of a government with limited powers, *viz.*, even when appropriately exercising those limited powers, the government may never resort to these other separately specified measures. The anti-monopolies clause cannot be construed just to provide redundant protection to limits on police powers and federal protections. The founders did not separately specify a freestanding right as a mere

redundancy. This further underscores the importance of the question of law presented by this case.

Given how expansive the police powers are, monopolies would be virtually always justifiable notwithstanding the clear text of the right itself that unequivocally forbids them. The police power encompasses anything "necessary to protect the public safety, health, morals, and welfare, and is of vast and undefined extent." *H&L Messengers, Inc. v. Brentwood*, 577 S.W.2d 444, 452 (Tenn. 1979). They have "never been definitively determined." *Knoxville v. Knoxville Water Co.*, 64 S.W. 1075, 1085 (Tenn. 1901). The text and original purpose of the anti-monopolies clause simply cannot square with permitting monopolies in a vast and undefined set of circumstances. A test that would give "considerable latitude" to legislative bodies, *Gallaher v. Elam*, 104 S.W.3d 455, 461 (Tenn. 2003), and allow for "any possible reason" to justify a classification, *see Harrison v. Schrader*, 569 S.W.2d 822, 825-26 (Tenn. 1978), leaves a constitutional right largely vulnerable to the legislative bodies that the right was designed to restrain in the first place. The limitation used by the Court of Appeals in this case was illusory. That flies "in the teeth," *Checker Cab*, 216 S.W.2d at 338 (citation omitted), of a constitutional prohibition. No principled reason for why this enumerated right would be so easily displaced is readily apparent. Settling this question is important.

Once again, this case illustrates how permissive the courts have become. The Andersons tried to find space between a justifiable monopoly and a regulation by maintaining that in *Checker Cab*, this Court's list of acceptable justifications was limited to the public's moral or physical well being. (Pls.' Resp. Br. at 17). For regulations, in contrast, the list was more expansive. The justifications could also include welfare, a justification notably unmentioned by this Court in *Checker Cab*. 216 S.W.2d at 337-38. That would mean that there was a class of actions that were important enough to be regulated, but not

monopolized. This reconciliation would have provided a way for the anti-monopolies clause to not be redundant and swallowed by the expansive police powers of a government. *Id.* at 17. Moral and physical well being are well understood terms. (Pls' Appel Br. At 21). Welfare, on the other hand, is far more expansive and nebulous. However, the Court of Appeals rejected this distinction, ruling that welfare and well being are synonymous terms. Slip. Op. at 5-6, n.5. That made the question of the legitimacy of a monopoly turn on whether the law was within the government's police powers. The anti-monopolies clause was rendered into nothing more than a vestigial appendage. Under this analysis, monopolies are permissible whenever a regulation is permissible and impermissible only when a regulation is illegitimate in the first place.

Under both state and federal law, enumerated rights are supposed to be displaced only rarely, and for the most serious of necessities. "The very enumeration of the right takes out of the hands of government – even the Third Branch of Government – the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." *Heller*, 554 U.S. at 634 (emphasis preserved). Deference to local governments is due only when it "does not violate any state statute *or positive constitutional guaranty*." *Fallin v. Knox Cty. Bd. of Comm'ns*, 656 S.W.2d 338, 343-44 (Tenn. 1983) (emphasis added); *see also Perry v. Lawrence Cty. Election Comm'n*, 411 S.W.2d 538, 539 (Tenn. 1967) ("[T]he Legislature of Tennessee, like the legislature of all other sovereign states, can do all things not prohibited by the Constitution of this State or of the United States."); *Martin*, 908 S.W.2d at 946 ("The only limits placed on the cities' regulatory powers are found in the state and federal constitutions . . . ."). Rational basis is for a "classification neither involving fundamental rights nor proceeding along suspect lines." *Heller*, 509 U.S. at 31. Freedom from monopolies is a right spelled out in Tennessee, but the effective reasoning from the Court of Appeals did not treat it that way.

Stated summarily, the Court of Appeals treats this enumerated right in an unusual fashion. There is no reason to treat this fundamental right any differently based on the cases from this Court. As a result, the Court of Appeals has struggled to leave open a way for the anti-monopolies clause to remain viable. If nothing else, the open question of when a monopoly could be tied to the police powers, yet be unconnected from the public's moral or physical well being, speaks to the difficulty of mapping a 1948 case onto the current constitutional terrain. The way charted by the Court of Appeals further accentuates the anomaly –review of a monopoly the same as a regulation when one is an enumerated right. Taking this case would help resolve these important questions of law.

C. Attaching a constitutional standard to a right singled out for constitutional significance in Tennessee is a critically important question of law.

Resolving these questions is critically important because the answers will provide direction for Tennessee courts on how to analyze a right that Tennesseans are uniquely entitled to have judicially protected. As it currently stands, a right Tennesseans took special care to embed in the Constitution is meaningless. If the Court of Appeals was correct, then the prohibition on monopolies – so unequivocal in the text – can be easily overridden by any legitimate justification, even aesthetic ones. The jurisprudence has largely come to a dead end and devitalized this right until this Court intervenes and settles it.

Tennessee's Constitution reflects a distinct history that would be lost if the case law just merged with federal jurisprudence. *See People v. Harding*, 19 N.W. 155, 156 (Mich. 1884) ("Every constitution has a history of its own which is likely to be more or less peculiar . . . ."). Courts should examine "the times and circumstances" surrounding the adoption of a state provision to determine its meaning, including "the general spirit of the times and the prevailing sentiments among the people." *Id.* In Tennessee's case, the drafters of its

Constitution took pains to include a constitutional provision deliberately omitted from the Bill of Rights. That represented a conscious choice. Tennessee's founders must be assumed to have acted out "of a desire to supplement aspects of the federal constitution that were seen as incomplete, or in order to take account of the different circumstances in which state constitution makers found themselves." John Dinan, *The American State Constitutional Tradition* 4 (2009). They must have wanted to leave no doubt that Tennesseans could count on the courts to protect them from governmentally protected monopolies.

The current methodology undoes a critical piece of the Tennessee constitutional project. By insisting upon the application of *federal* constitutional law to a *state* constitutional prohibition that lacks a federal analogue, the reasoning of the Court of Appeals inadvertently treats the anti-monopolies clause as if it had never been spelled out. Even in this case, the meaning of Tennessee's *expressed* prohibition on monopolies was treated as no more significant than the unexpressed prohibition against arbitrary laws in the U.S. Constitution. Addressing these related questions of Tennessee constitutional law would be a useful corrective to the idea that "state supreme courts [should] be reduced to mere conduits through which federal edicts flow." *See State v. Miller*, 584 S.W.2d 758, 760 (Tenn. 1979).

This is the "court of last resort" for the Tennessee Constitution, *State v. Randolph*, 74 S.W.3d 330, 334 (Tenn. 2002), with "full and final power." *Miller*, 584 S.W.2d at 760. As the high court of Tennessee, it stands as "society's chief expositors of constitutional principles." *Martin*, 908 S.W.2d at 947 (citations omitted). Unless this Court reviews this anti-monopolies case, the Court of Appeals will continue to apply misplaced significance on federal authority and struggle to apply *Checker Cab* to modern constitutional law. As argued above, this Court's jurisprudence surrounding Tennessee's anti-monopolies clause did not contemplate modern doctrine and does not overlay well. "This Court has a

continuing duty to consider whether the common-law, as created and developed through case law, is obsolete." *Broadwell v. Holmes*, 871 S.W.2d 471, 473 (Tenn. 1994). The use of the rational basis test has resulted in the constitutional anomalies up and down the line. This Court's interest in exercising its supervisory authority over the Tennessee Constitution is especially compelling because "correction through legislative action is practically impossible." *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) (quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 407 (1932) (Brandeis, J., dissenting)).

II. There is a need to bring uniformity in the law as to whether courts can consider evidence that the monopoly was intended to confer a private benefit.

With all due respect to the Court of Appeals, its decisions regarding the anti-monopolies clause are inconsistent in analyzing whether evidence that a monopoly was intended to provide a private benefit is relevant. This Court has always stressed that these are the very sorts of impermissible monopolies that the anti-monopolies clause prohibits. Yet the Court of Appeals has varied in its application of this reasoning. Just as in this case, the Court of Appeals viewed itself as institutionally incapable of assessing legislative motive, even while recognizing that impermissible monopolies exist to provide a private benefit. Here, the Court of Appeals dismissed substantial evidence that Metro's monopoly was intended to protect the traditional hospitality sector that viewed homesharing as a threat. This Court's review would bring needed uniformity to the law.

A. The precedent of this Court requires an inquiry into whether a monopoly was intended to confer a private benefit.

This Court's approach to analyzing monopolies always involved scrutiny as to whether the monopoly was intended to confer benefit or stifle competition. For instance, in *Leeper v. State*, 53 S.W. 962 (Tenn. 1899), this Court upheld a challenge to the "Uniform Text-Book Act," which authorized a commission to select a particular series of textbooks for

public schools. This Court found notable the absence of even an allegation that "the intention or operation of this Act is to confer a pecuniary benefit on the State or school officials or publishers." *Id.* at 965. In upholding the ability of the state to act as an ordinary marketplace participant, this Court observed that the Constitution forbade monopolies intended to advance an illicit aim. *Id.* ("The monopoly prohibited by the Constitution is a privilege farmed out to the highest bidder, or conferred because of favoratism to the donee, and not one awarded to the lowest bidder and for the convenience and benefit of the public."). The purpose of the monopoly lies at the heart of the question, according to this Court's precedents.

Likewise, in *Checker Cab,* this Court continued to emphasize that courts must ask whether the law *actually* furthers the stated public purpose, even if legitimate. 216 S.W.2d at 337 ("[I]t is the duty of the Court to determine whether the monopoly does have any legitimate relation with the declared public purpose of the act."); *see also N. Little Rock Transp. Co.*, 184 S.W.2d at 54-55 (explaining the lack of connection to police powers "based on substantial reasoning that an exclusive taxicab business" advanced public welfare). Still more, the Court directly authorized judges to question whether the stated goal was the actual goal. *Checker Cab*, 216 S.W.2d at 337 ("The courts decide . . . whether that is really the end [] in view.") (citation omitted) (quotation omitted). In other words, the courts must determine whether the stated rationales are pretextual. That makes practical sense as few governments would be inclined to admit in court that they enacted a law intended as cronyism. In fact, it was because this Court found that there was no legitimate relation between the monopoly in question – taxi cabs in Johnson City – and the public purpose – the regulation of the operation of taxicabs over the streets of Johnson City – that the Court struck down the measure as violating the anti-monopoly clause. *Id.* Notably, this Court did not even have to find that the monopoly was intended to benefit a private party; it just

disproved that it benefitted the public. *Id.* Naturally, the ascertainment of the monopoly's purpose was part of the analysis from this Court.

The furtherance of "the declared public purpose," and not some other contrived one, is a requirement that sets the anti-monopolies test apart. Under ordinary rational basis review, courts uphold classifications if any conceivable purpose for the distinction exists. It does not matter whether that was the actual motivation, and it does not matter if any evidence supported it. *See Riggs v. Burson*, 941 S.W.2d 44, 53 (Tenn. 1997). This Court has long held in the substantive due process context that it cannot question "the motive of the Legislature in enacting legislation," or, in particular, whether it "was passed for the benefit of private interests." *Northington*, 300 S.W.2d at 918. Once removed from the equation, review of this enumerated right becomes indistinguishable from review under the unenumerated right to substantive due process. This is another way in which interpretation of the anti-monopolies clause has become redundant.

B. The Court of Appeals lacks uniformity when analyzing the purpose of the monopoly, including in this case where it refused to even consider evidence that Metro's monopoly was intended to protect hotels from competition.

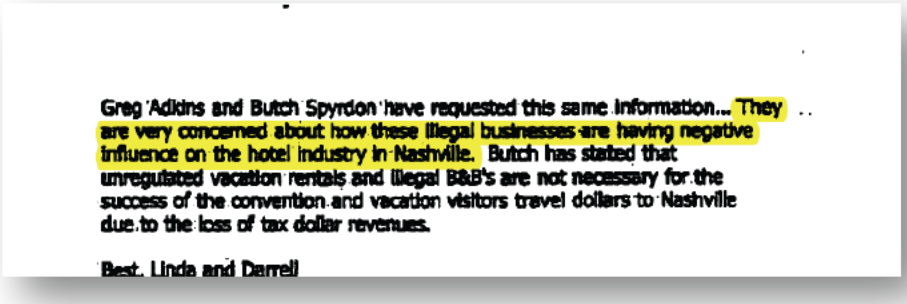
The Court of Appeals has not been uniform when looking to the monopoly's purpose, even within the same decisions. The Court of Appeals has recognized that this Court's precedent in *Leeper* outlawed monopolies that are intended for private gain. *See Esquinance*, 195 S.W.3d at 47 (quoting *Leeper*, 53 S.W. at 965) (stating that the court ruled that the anti-monopolies clause prohibits monopolies "conferred because of favoritism"). And the Court of Appeals has also indicated it has some ability to analyze the purpose of an alleged monopoly. Even while using the rational basis test in *Dial-A-Page*, the Court of Appeals nevertheless stated, "we look to the policy behind the Act." 823 S.W.2d at 207. The Court then concluded that the Act in question (the Radio Common Carrier Act) was constitutional because it did not prohibit competition. Likewise, in *Esquinance* – again

using rational basis review – the Court of Appeals rejected the argument that Tennessee granted an unconstitutional monopoly by recognizing a single professional employee organization as the representative for collective bargaining. 195 S.W.3d at 47. Nevertheless, it did so by analyzing the legislative purpose. *Id*. at 47-48 ("The purpose and policy of the [Educational Professionals Negotiations Act] is clearly for the promotion of the welfare and benefit of the students, teachers, and the public as a whole.").

Yet when it came to an inquiry into a monopoly's impermissible purpose, the Court of Appeals was not uniform in its approach. Both cases also emphasized that their ability to assess the true purpose of the challenged laws were highly circumscribed. So long as the legislature had "some foundation in fact," the courts were rendered "powerless" to scrutinize any further. *See Dial-A-Page*, 823 S.W.2d at 206; *Esquinance*, 195 S.W.3d at 47. This approach was not uniform. If the Court of Appeals was to accredit this Court's instruction to look to whether the protection of the public was "really the end [] in view" *Checker Cab*, 216 S.W.2d at 337, then it should have assessed evidence of the monopoly's purpose, not just whether a foundation in fact existed for some public purpose. It proved it can look for a legitimate purpose even while it viewed itself as incapable of recognizing an illegitimate one.

That inconsistency is echoed in this case. Evidence abounded that the monopoly is intended to protect private interests but the Court of Appeals regarded it as irrelevant. Metro admitted it did as much. According to its sworn statement, the law came about at the suggestions of particular bed and breakfasts that wanted to be taxed "on a level playing field with STRPs." (TR. VII, 913: Def.'s Resp. to Pls.' Interrog. No. 26, Pls.' Ex. C.2). In an email with the prime sponsor of Metro's law, Burkley Allen, a bed and breakfast that viewed homesharing as an unfair competitor rallied around Greg Adkins, CEO of the Tennessee Hospitality Association ("THA") (TR. VII, 939: Pls.' Ex. C.2.D at 009), and Butch

Spyridon, CEO of Nashville Convention and Visitors Corp (TR. VIII, 1106: Pls.' Ex. F, ¶ 2), who were "very concerned about how these illegal businesses *are having negative influence on the hotel industry in Nashville*." (TR. VII, 938: Pls.' Ex. C.2.D. at 008) (emphasis added).



Greg Adkins and Butch Spyrdon have requested this same information... They are very concerned about how these illegal businesses are having negative influence on the hotel industry in Nashville. Butch has stated that unregulated vacation rentals and illegal B&B's are not necessary for the success of the convention and vacation visitors travel dollars to Nashville due to the loss of tax dollar revenues.

Best, Linda and Darrell

Thus, industries in competition with homesharing coalesced around devising a political solution for an economic problem. This phrase, "leveling the playing field," lurks throughout the whole saga and is evidence *per se* of illegitimate purpose. Spyridon outright states that the law was passed to "level the playing field between short-term rentals like Airbnb and others in the lodging industry." (TR VIII, 1108: Ex. F ¶ 8). "Leveling the playing field" litters Councilmember Allen's communications even as she colluded overtly with hotels and bed and breakfasts (TR. VII, 933, 935, 942, 945, 950-952, 974, 990, 991, 939: Pls.' Ex. C.2.D) but not with the homeowners the cap was ostensibly designed for (and who could have cared less about the hotels' bottom-line). Councilmember Allen directly collaborated with the THA early in the process. *Id.* at 939. THA had actual involvement, *id.* at 939, 018, expressing commitment to the issue and the desire to be involved in the drafting of the ordinance. *Id.* at 949. The B&B, in coordination with others in hospitality, issued a call of action to Councilmember Allen and Convention & Visitors Bureau to "get involved with the [American Hotel Association] on this." *Id.* at 953. The hospitality industry formally endorsed the proposed law. Councilmember Allen directed copies of the endorsement to be

printed and placed on every councilmember's desk before the December 2, 2014 council meeting where the bill that imposed the cap passed on second reading. *Id.* at 1012. Far more than creating a material dispute, evidence that the monopoly was intended to "level the playing field," or raw protectionism, was essentially unrebutted.

The Court of Appeals refused to even consider this evidence. Because the trial court granted Metro's motion for summary judgment, the Andersons only needed to point to the existence of specific facts in the record, *see Rye v. Women's Care Ctr. Of Memphis, MPLLC*, 477 S.W.3d 235, 264 (Tenn. 2015), viewed in the most favorable light in order to defeat summary judgment. *See Luther v. Compton*, 5 S.W.3d 635, 639 (Tenn. 1999). Clearly, at least a factual dispute about the purpose of the cap exists, and so the Court of Appeals could only have ignored this evidence if it was not material. *See Byrd v. Hall*, 847 S.W.2d 208, 215 (Tenn. 1993) (fact is material when "it must be decided in order to resolve the substantive claim or defense at which the motion is directed"). The Court of Appeals ruled that the evidence of the true motivations for the cap did not matter: "the relevant judicial considerations under this test do not involve an inquiry into the motivations or 'true purpose' behind the ordinance. Slip. Op. at 10. The test "does not require a review of a legislature's actual subjective motivations, assuming such motivations could actually be divined." *Id*. at 11-12. The Court of Appeals then purely accredited the evidence submitted by Metro. *Id*. at 13-14. Evidence of the monopoly's purpose was set to the side.

By regarding evidence that demonstrated that Metro's monopoly was intended to "confer a particular benefit," *see Leeper*, 53 S.W. at 965, on the hospitality lobby as irrelevant, the Court of Appeals then essentially held that the monopoly's intended purpose was not material. *See Byrd*, 847 S.W.2d at 215 (not material if need not be decided in order to resolve the claim). This was not a uniform application of the law as this Court has always regarded intent to confer private benefit as the s*ine qua non* of an impermissible monopoly.

The ruling was not even internally uniform - the Court of Appeals cited this Court's *Leeper* opinion for the proposition that monopolies were impermissible when "granted for a money consideration, or which are bestowed upon an individual for his benefit," slip. op. at 9, yet it disregarded evidence proffered to show exactly that. *Id*. at 10-11. This circle cannot be squared. To demonstrate that a monopoly was awarded "for a monetary consideration," or "for [an individual's] benefit" and not for "the public good," *id*. at 9, becomes literally impossible if the courts will not "inquir[e] into the motivations or 'true purpose' behind the ordinance?" *Id*. at 10. The purpose of the monopoly was, contrary to the lower court's ruling, of high legal significance, as the Court of Appeals appeared somewhat aware of by citing *Leeper* in the first place.

The Court of Appeals squared its disavowal of the relevancy of the monopoly's purpose with this Court's seemingly opposite instruction to examine the "end in view" by citing a number of Tennessee decisions purporting to state that courts do not examine legislative "motive." Slip. Op. at 11 (citing *Davidson Cnty. v. Rogers*, 198 S.W.2d 812, 814-15 (Tenn. 1947), *Fiser v. City of Knoxville*, 584 S.W.2d 659, 662 (Tenn. Ct. App. 1979), *Mobile Home City of Chattanooga v. Hamilton Cnty.,* 552 S.W.2d 86, 87-88 (Tenn. Ct. App. 1976)). All three cases – only one of which hailed from this Court – involved the limits of the police powers and the rational basis test. None concerned monopolies or any other enumerated right; none stood for the proposition that the purpose of a monopoly was irrelevant for purposes of overcoming this enumerated right. They rather sharpen the point made here – the lower courts have all but said it makes no difference if the anti-monopolies clause is in the Constitution at all, treating it as merely redundant to the question of the limits on police powers. In fact, the one case from this Court ruled: "the courts decide merely whether [the challenged law] has any real tendency to carry into effect the purposes designed … *and whether the act in question violates any provision of the state or federal*

Constitution." *Rogers*, 198 S.W.2d at 814 (emphasis added). These were supposed to be separate considerations.

An examination of impermissible intent is hardly controversial with enumerated rights. For instance, in considering a free exercise claim "it is appropriate to ask 'whether the government's actual purpose is to endorse or disapprove of religion." *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring). Even content-neutral commercial speech restrictions warrant strict scrutiny when enacted out of hostility to the speaker's viewpoint. *See Matal v. Tam*, 137 S. Ct. 1744, 1767 (2017). Further, even under rational basis, courts have recognized that "the singling out of a particular economic group, with no rational or logical reason for doing so, was strong evidence of an economic animus with no relation to public health, morals or safety." *Merrifield v. Lockyer*, 547 F.3d 978, 989 (9th Cir. 2008). Rather than prove that courts do not examine the purpose of monopolies, the cases cited by the Court of Appeals underscore the very point made here: enumerated rights are supposed to get different review than ordinary scrutiny for an irrational law precisely because they are enumerated.

The Court of Appeals' credulous acceptance of the justification for the cap in this case, as well as the rationale in support of treating non-owner occupied homesharers for radically different treatment, and refusal to even consider evidence that the monopoly was conferred upon the hospitality sector for its benefit, demonstrate how inconsistly the courts analyze monopolies. Thus, the need to bring unformity to the law is strong.

III. This Court can settle questions important to the public about Metro's homesharing monopoly specifically, and how cities can respond to the sharing economy more generally.

This case would also secure settlement of a question of undeniable public importance. This case has, from the beginning, aroused local opinion and attracted national media and state and local lawmakers. Homesharing itself has generated intense public

opinion in Nashville for years now. As the new economy disrupts the older one, the question of whether entrenched providers may enlist the government to enact monopolies at their behest is sure to reoccur. If this Court would accept review, then it would bring some parameters to the debate.

Homesharing in Nashville holds the public's interest to such a degree that it basically has its own press corps. The Tennessean newspaper described Metro's ongoing response to homesharing as "the polarizing issue of the year." David Plazas, *Airbnb regulations: the polarizing issue of the year*, The Tennessean (Jan. 11, 2017).[8] When this case was filed, it was well covered by most major media outlets. *See, e.g.,* Stacey Barchenger, *Lawsuit challenges Nashville's Airbnb ordinance*, The Tennessean (Aug. 26, 2015)[9]; *Couple sues Metro over Airbnb ordinance* (WSMV television broadcast Aug. 26, 2015).[10] The Andersons' victory on the vagueness issue attracted the attention of national publications that are notably concerned with property rights and constitutional originalism. *See, e.g.,* Austin Yack, *A Win for Airbnb and the Constitution in Nashville*, National Review (Oct. 26, 2016) ("Other cities and states trying to crush the upstart should pay attention."); Hannah Cox, *A Huge Win for Property Rights in Nashville*, The Daily Signal (Nov. 2, 2016) ("Property rights are one of the foundations on which America was built.").[11] Then Vice Mayor David Briley took to twitter to comment that very day, however inaccurately: "Congrats @BeaconTN Airbnb now prohibited in BNA. Prior code did not permit in

[8] Available at: https://www.tennessean.com/story/opinion/columnists/david-plazas/2017/01/11/airbnb-regulations-polarizing-issue-year/96450334/ (last viewed Apr. 1, 2018).
[9] Available at: https://www.tennessean.com/story/news/afternoon/2015/08/26/lawsuit-challenges-nashvilles-airbnb-ordinance/32341537/ (last viewed Apr. 1, 2018).
[10] Available at: http://www.wsmv.com/story/29884100/couple-sues-metro (last viewed Apr. 1, 2018).
[11] Available at: https://www.dailysignal.com/2016/11/02/a-huge-win-for-short-term-rentals-and-property-rights-in-nashville/ - :%20https://www.dailysignal.com/2016/11/02/a-huge-win-for-short-term-rentals-and-property-rights-in-nashville/ (last viewed Apr.1, 2018).

residential districts. #oops #judicialactivismgoneawry." Joey Garrison, *What does Nashville judge's ruling on Airbnb mean?* The Tennessean, Oct. 24, 2016.[12]

Legislation about homesharing is ongoing at both the local and state level.[13] In January of 2018, Metro enacted its latest and most draconian measure yet: Metro. BL2017-608. *See* Appendix 2, Metro. BL2017-608. Metro's antipathy towards homesharing is not indicative of the larger public. Recent polling conducted by Vanderbilt University demonstrated broad support for homesharing among Nashvillians, with 62% saying it should be allowed in residential neighborhoods.[14] A state bill negating this action is headed for a final vote at the time of this filing. *See* Appendix 3, SB1086/HB1020, amends. 2-3, 110th Gen. Assemb., Reg. Sess. (Tenn. 2018). Homesharers have formed an advocacy group.[15] A cursory review of any of the legislative hearings – state or local – demonstrates that scads of citizens on both sides of the debate take time to engage in passionate debate in

[12] Viewed online at: http://www.tennessean.com/story/news/2016/10/24/what-does-nashville-judges-ruling-airbnb-mean/92694708/ (last viewed Apr. 1, 2018).
[13] Although under the current version of Metro's law the cap will be phased out, banning all non-owner occupied homesharing from residential zones, *see* Appendix 2, Metro. BL2017-608, it remains the case, at least presently, that the reason the Andersons cannot now homeshare is because of the cap. There is an "actual present harm," *Grendel v. Ohio Supreme Ct.*, 252 F.3d 828, 833 (6th Cir. 2001), and this case remains a live controversy. Besides, the late preemption law heads to a final floor vote *see* , so it is highly uncertain that Metro's ban will ever come into effect. Also available at http://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=SB1086 (last viewed Apr. 1, 2018).
[14] Available at: https://www.vanderbilt.edu/csdi/Nashville_2018_topline.pdf (last viewed Apr. 1, 2018).
[15] Available at: https://nastra.org (last viewed on Apr. 1, 2018).

a way they would for very few other issues.[16] Little disagreement surrounds the importance of homesharing in Nashville, even if the two sides agree on little else.

The issue is larger than just homesharing in Nashville because local governments are reacting to the disruptions cause by the sharing economy by, for the first time ever and in a way it never did with long term rentals, asserting the right to dictate to homeowners what they may do with their bedrooms. "[C]ities nationwide have responded to innovations in home-sharing not by welcoming this economic opportunity or respecting the rights of property owners, but by imposing draconian new rules that deprive Americans of some of their most basic constitutional rights." Sandefur, *supra*, at 397. As businesses resort to the law to protect them from competition, any number of questions important to the public emerge: What measures may governments employ? Is it of legal significance when they act to protect the businesses who are threatened and not the public? Are the courts obliged to ignore it when that is both obviously true, admitted in discovery, and supported by evidence as in this case? The rapid unfolding of technological developments on traditional service models is likely to accelerate and impact governments around the country.

These underlying questions concern the fundamental relationship between governments and the governed, made still more pressing in the new economy. As Senator Mark Green responded to Councilmember Allen's revealing claim that the property right to homeshare was "a privilege," by her reckoning: "be real careful about saying somebody who owns a piece of property doesn't have a right to use that property how they want to." Sen. Green pointed out that Metro "just arbitrarily say[s] the first 3 percent get to [do] it and the

[16] For instance, video of the senate committee hearings are available at the General Assembly's website: http://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=SB1086 (last viewed Apr. 1, 2018). Metro broadcasts its council hearings on a Youtube channel. Metro's latest bill relative to homesharing was finally passed on January 23, 2018, with floor debate and hearing on competing bill BL2017-937 dominating the meeting. Available at: https://www.youtube.com/watch?v=y-C4MjnL4B4&t=0s&list=PLAAE32390485B37DB&index=14 (last viewed Apr. 1, 2018).

other 97 percent don't." Eric Boehm, *Nashville Councilwoman: Deciding Who Sleeps in Your Home is a Privilege Bestowed by Government, Not a Right*, Reason (Sept. 19, 2016).[17] Whether homesharing is a privilege or a right is, standing alone, an item of evident concern for the public.

The related question here forces its way to the fore – is the freedom from monopolies a right or a privilege. The drafters of Tennessee's Constitution surely thought they left no doubt, but the effective reasoning of the lower court calls that into question. If nothing else, this Court can settle whether the right to be rid of monopolies is a privilege or not.

As governments sort out how best to respond to a rapidly changing economy, one thing that would be important for the public to know is whether monopolies are a permissible response in Tennessee.

CONCLUSION

This Court should grant permission to appeal.

Dated: April 3, 2018.

Respectfully submitted,

BRADEN H. BOUCEK
B.P.R. No. 021399
Beacon Center of Tennessee
[redacted]
P.O. Box 198646
Nashville, TN 37219
[redacted]

Counsel for the plaintiffs.

[17] Available at: https://reason.com/blog/2016/09/19/nashville-councilwoman-deciding-who-slee (last viewed Apr. 1, 2018).